No. 90-1723

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JEROME D. BROWN, et al.,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

Petitioners, all of the elected city officials of Danville, Illinois and their attorney, were prosecuted and convicted by the State of Illinois for their negotiation of a consent decree which was submitted to a United States district court in a Voting Rights Act lawsuit challenging Danville's form of government. The negotiation of that decree was approved by the district judge, but later deemed a violation of state conflict of interest laws by the Supreme Court of Illinois. Petitioners were denied any defense of reliance on the United States district judge even though all material facts surrounding the negotiations were presented for approval to the district court, and that court found no violation of Illinois conflict of interest laws.

Was the prosecution and conviction of petitioners an abridgement of rights they enjoyed as United States citizens to freely express themselves and seek access to the courts of this country?

Does the prosecution and conviction of local officials for their agreement to present a consent decree impede the informed processes of a district court hearing a Voting Rights Act case?

What facts and circumstances of a negotiated consent decree in a Voting Rights Act case must be examined by a district court before approval?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The petitioners[1] respectfully request that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this case on November 30, 1990.

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[1] Wilbur Scharlau was the Finance Commissioner and Acting Mayor (the Mayor having resigned prior to this time). Scharlau is now deceased. Petitioner Ernie Cox was the Commissioner of Streets and Improvements. Petitioner Jerome Brown was the Commissioner of Public Health and Safety. Petitioner Raymond Randall was the Commissioner of Public Property. Petitioner Wendell Wright served as the City's Corporation Council by appointment of the Acting Mayor.

The Respondent here is the People of the State of Illinois.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at *People v. Scharlau*, 141 Ill.2d 180, 152 Ill. Dec. 401, 565 N.E.2d 1319 (1990) and is attached as Appendix A hereto.

The opinion of the Appellate Court of Illinois in *People v. Scharlau* is reported at 193 Ill.App.3d 280, 140 Ill. Dec. 260, 549 N.E.2d 911 (4th Dist. 1990).

The opinion of the United States Court of Appeals for the Seventh Circuit in the matter collateral to the State proceedings is reported as *Derrickson v. City of Danville*, 845 F.2d 715 (7th Cir. 1988).

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on November 30, 1990 (Appendix A). A timely Petition for Rehearing was denied on February 4, 1991 (Appendix B), and this petition for certiorari was filed within ninety days of that date. This court's jurisdiction is invoked under Title 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Petition Clause of the First Amendment to the federal Constitution. That amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The case also involves the state statutory provision found at Illinois Revised Statutes, 1987, Chapter 38, Section 4-8, which provides:

> (a) A person's ignorance or mistake as to a matter of either fact or law, except as provided in Section 4-3(c) above, is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the offense.
>
> (b) A person's reasonable belief that his conduct does not constitute an offense is a defense if:
>
> * * *
>
> (4) He acts in reliance upon an official interpretation of the statute, regulation or order defining the offense, made by a public officer or agency legally authorized to interpret such statute.
>
> * * *
>
> (d) A defense based upon this Section 4-8 is an affirmative defense.

STATEMENT OF THE CASE

On January 14, 1987, black minority voters filed a class action lawsuit challenging the commission form of government of the City of Danville, Illinois as diluting their voting rights in violation of the Voting Rights Act of 1965, as amended, Title 42 U.S.C. Sec. 1973 *et seq.* Plaintiffs sought termination of at-large elections of the City Council, an injunction prohibiting further at-large elections of the Danville City Council and any further elections under the existing form of government. They also sought creation of a municipal government consisting of members elected from single-member districts from which minorities might be elected.

At that time, petitioners were the duly elected commissioners of the City of Danville and their corporation counsel. The commissioners exercised all legislative and executive powers on behalf of the City.

District Judge Harold Baker, who was assigned the Danville Voting Rights Act case, had, two days earlier, decided that the same commission form of government in Springfield, Illinois (which had demographic similarities to Danville at the time) violated the federal Voting Rights Act and had enjoined further elections under the commission form of government in Springfield.

As their corporation counsel, petitioner Wilbur Wright advised the commissioners of the City of Danville of the status of the Springfield litigation and of the cost of that litigation, in excess of half a million dollars, to the City of Springfield.

Had the commissioners litigated the case, they would have continued in office until the case was finally resolved.

Reacting to the Danville lawsuit, the commissioners on January 15, 1987, placed on the April election ballot a referendum proposition which would have changed the commission form of government to a mayor-aldermanic form. Had this proposition passed, under Illinois law, the commission form of government would have continued for four more years, the commissioners would have had to run for re-election, and whomever was elected would have had four years in which to legislate ordinances and formulate a smooth transition from full-time elected commissioners possessing both legislative and executive powers and responsibilities to a form of government wherein these powers were split, with part-time aldermen executing the legislative functions.

The referendum was communicated to James Craven, the attorney representing the federal class plaintiffs, as a possible method of resolving the Voting Rights Act lawsuit. The class plaintiffs rejected this proposal on the ground that while the mayor-alderman form of government was acceptable, the referendum did not allow for this change soon enough and were desirous of immediate elections for mayor and aldermen.

The ensuing series of proposals and counter-proposals between Wright and Craven were premised on the City of Danville adopting a mayor-alderman form of government and focused solely on the method for establishing a smooth and orderly transition from the existing form of government in Danville to the new, while saving Danville from the enormous expense of litigating the federal lawsuit with the concomitant probability of ultimately losing.

When the class plaintiffs rejected the referendum proposal, the commissioners proposed an intermediate form of government wherein they would stand for election to

their executive office functions only, in what they described as department head positions. This proposal was likewise rejected by the class plaintiffs because it was based on at-large elections. The class plaintiffs then counter-proposed that the existing commissioners hold over, without running for election, as department heads who would perform the executive functions of Danville government for two years.

Initially the commissioners rejected any holdover proposal from the class plaintiffs. The settlement negotiations then started. The commissioners ultimately agreed to plaintiffs' proposal for a three year holdover transition to be incorporated in the draft consent decree submitted to Judge Baker for his review and approval on February 3, 1987.

It is undisputed that the commissioners voted on and approved the resolution approving this draft consent decree after having been informed by their corporation counsel that such holdover periods regularly occurred in the context of federal voter rights litigation. It is also undisputed that acceptance of the settlement proposal was viewed as conditional upon the review of the United States District Court and a finding by that court that the settlement was in accordance with Illinois law.

On February 13, 1987, the class action plaintiffs amended their complaint to add States Attorney Craig DeArmond as a party defendant. This was done as a result of DeArmond issuing subpoenas to the commissioners, Wendell Wright and others, including the class action plaintiffs, for the announced purpose of conducting a grand jury inquiry into the terms of the proposed settlement agreement.

Judge Baker added the State's Attorney as a party solely for the purpose of entering a preliminary injunction barring the grand jury proceeding on the ground that the propriety under Illinois law of the litigants' conduct in negotiating and proposing a settlement had to be decided by the federal court, but invited DeArmond to participate in the federal proceeding and to call to the court's attention any violations of state law.

Other public intervenors as well as DeArmond objected to the provisions in the settlement agreement relating to holdover or transition terms for the commissioners and salary provisions at the February 25, 1987 fairness hearing before Judge Baker. The Judge's attention was directed specifically to the opinions in *Mulligan v. Bradley*, 131 Ill.App.3d 513, 475 N.E.2d 1029 (3rd Dist. 1985) and *People v. Savaiano*, 31 Ill.App.3d 1049, 335 N.E.2d 553 (2d Dist. 1975) *aff'd*, 66 Ill.2d 7, 359 N.E.2d 822 (1976).

Although initially reticent to determine whether the terms or manner of negotiating the settlement were violative of state law, Judge Baker did review the questions raised concerning the transition period and the holdover terms of the commissioners as department heads. In his written order, Judge Baker specifically made several relevant findings:

> The District Judge found:
>
> > The single district, at large election system, which is inherent in the commission form of government, prevents cumulative voting and dilutes the voting power of minority populations and lessens their ability to elect candidates of their choice.

And, although initially reluctant, the court went on to find:

> In addition, the defendants have strong concerns about orderly transition from the commission form of government to the mayor-aldermanic form. They articulate reasonable, sensible bases for their negotiated settlement of a three-year term of office in purely administrative capacities . . . A more difficult question is whether the Consent Decree violates any Illinois law. The intervenors and the State's Attorney have called the court's attention to the provisions of Illinois Revised Statutes, Chapter 24, par. 3-14-4 and 8-1-7, Chapter 38, par. 33-3, and Chapter 102, par. 3. I have read the cases presented to me by Mr. Mellon's attorney, *Mulligan v. Village of Bradley*, 131 Ill.App.3d 513, 475 N.E.2d 1029 (3rd Dist. 1985), and *People v. Savaiano*, 31 Ill.App.3d 1049, 335 N.E.2d 553 (2nd Dist. 1975). I am persuaded by the defendants' arguments that this case is dissimilar and factually distinguishable from the *Bradley* case and the *Savaiano* case.
>
> Those cases did not deal with municipal officers settling complex and extravagantly expensive civil rights litigation. This case does. The settlement also provides continuity of municipal services and stability in transition during a complete change in form of government . . . The defendants did not violate their fiduciary relationship to the city or secure a personal advantage in conflict with their duty to serve the city. They made a sensible and reasonable settlement of a difficult lawsuit. *Derrickson, et al v. City of Danville*, Case No. 87-2007, (Central District, Ill.) Minute Order, February 27, 1987.

After entering this final judgment, which was never appealed, Judge Baker dissolved the injunction against the grand jury proceedings.

The State's Attorney proceeded with the grand jury investigation, calling each of petitioners twice prior to their indictment on July 17, 1987.

The petitioners then sought to enjoin the state court prosecution on the ground that the issues had been litigated and resolved in the federal court proceeding to which the State's Attorney was a party. A preliminary injunction was entered against the prosecution on July 28, 1987, and Judge Baker issued the permanent injunction on August 27, 1987. On appeal from the issuance of the permanent injunction, the United States Court of Appeals for the Seventh Circuit reversed the district court and dissolved the injunction on the ground that the State's Attorney had not been afforded adequate opportunity to participate in the fairness hearing by the district court, stating:

> There is therefore no authoritative finding to be protected by an injunction against the state prosecution. The district court probably did not mean to approve the manner of negotiation (as opposed to the substance and binding quality) of the decree; to the extent it approved the manner of negotiation, that approval was not essential to the judgment; and even if the subject was essential to the judgment, the district court did not offer the State's Attorney a full and fair opportunity to litigate the subject. *Derrickson v. City of Danville*, 845 F.2d 715, 723 (7th Cir. 1988).

At the time of the Court of Appeals ruling, two of the commissioners had retired from their positions as department heads and two were still working for the city, but in different capacities. The Corporation Counsel was not reappointed by the new mayor.

The State's Attorney then proceeded to try the Commissioners and former Corporation Counsel Wendell Wright in a bench trial before Judge Komada on charges of conspiring to violate state conflict of interest laws and official misconduct. The prosecution's case consisted of the consent decree, all pleadings and briefs submitted in the

federal court proceedings, the transcript of the hearings before the approval of the consent decree, the injunction orders and opinions, the opinion of the Seventh Circuit Court of Appeals, the grand jury transcripts of the defendants' testimony and two indemnification ordinances passed by the Danville City Council in July of 1986 and March of 1987.[2]

Each petitioner testified to his understanding that the settlement proposal submitted to the district court was tentative pending that court's approval, that each of the commissioner defendants had relied upon the advice of their counsel Wendell Wright that the settlement proposal was legal, and Wendell Wright testified that it was his understanding that the settlement proposal was tentative and had to be submitted to the federal court for a determination of whether the terms of the proposal violated any state policy or law.

On February 17, 1989, the trial judge found the petitioners guilty of seven of the eight counts of the indictment and petitioner Wright not guilty of official misconduct as charged in Count VII of the indictment. The Court entered judgment against the commissioners and Mr. Wright on Count V charging official misconduct and sentenced the commissioners each to two years conditional

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[2] In its opinion, the Supreme Court of Illinois referred to the indemnification ordinance passed after entry of the consent decree as supportive of their view that petitioners knew they were acting outside the limits of their authority in negotiating the proposed settlement. This reference is incorrect and unsupported by the record.

The record reflects that the ordinance was prompted by concerns of the City Treasurer as to her liability in the investing of City monies and did no more than extend the provisions of the previously existing indemnification from criminal proceedings to appointees of the City Council. It afforded no additional protection to the City Commissioners.

discharge and fined them each $1,000.00. The Court sentenced Wright to two years conditional discharge, 90 days in jail and fined him $5,000.00.

The petitioners appealed their convictions to the Appellate Court of Illinois, Fourth District. On that appeal, the petitioners argued that Illinois penal statutes forbidding public officials' interests in contracts do not apply to the facts of this case where the public officials charged were the only people authorized to act on behalf of the city; clearly were concerned, as the federal court so found, with the welfare of the City of Danville in recommending an orderly transition between two totally different forms of government; and submitted these recommendations as part of an agreed proposal to settle a potentially costly and difficult case for the review and approval of the federal court. They also argued that their acts in negotiating the proposed consent decree were legislative acts and thus immune from prosecution. And finally, the petitioners argued that they were justified in relying on the federal court's determination that the consent decree did not violate any public policy or law of the State of Illinois as a defense to the criminal charges.

The Appellate Court reviewed the facts of this case at length and found that:

> Defendants argue section 3-14-4(a) of the Municipal Code and section 3(a) of the Corrupt Practices Act do not apply to situations where the subject of a lawsuit against the city is the form of its government and its officials negotiate a settlement. Since these statutes do not apply, defendants contend they could not have been convicted of official misconduct based upon violations of these statutes. Under the facts presented in the instant case, we agree.

People v. Scharlau, 193 Ill.App.3d 280, 549 N.E.2d 911, 917 (4th Dist. 1990).

The Court further stated:

> We know of no fashion in which the defendants could have negotiated the best settlement for the City and have avoided any discussion of transitional governments where personal interests would be impacted. Therefore, in a mixed-interest situation such as that presented in the instant case, the conflict-of-interest statutes are not violated by negotiating a settlement which includes an incidental personal benefit. Settlement of the lawsuit was within the scope of the defendants' public duties, their actions were open to public scrutiny, and no practical manner existed for the defendants to remove themselves from the negotiation and settlement process.

(549 N.E.2d at 919).

Given this holding, the Appellate Court specifically declined to rule on the applicability of the defense of reliance.

The Appellate Court reversed petitioners' convictions without remand.

The State's Attorney filed a Petition for Leave to Appeal and petitioners filed a Response with the Supreme Court of Illinois. The court granted Leave to Appeal on April 4, 1990.

The Supreme Court of Illinois, by opinion dated November 30, 1990, reversed the judgment of the Appellate Court of Illinois and affirmed the judgment of the circuit court, thus reinstating petitioners' convictions. *People v. Scharlau*, 141 Ill.2d 180, 565 N.E.2d 1319, 152 Ill. Dec. 401 (1990). In this opinion, the state court found that the consent decree could not be characterized as a court order, but rather, was an independent contractual agreement whose interpretation is controlled by state contract law. Having so found, the court determined that under Illinois

conflict of interest statutes, petitioners had negotiated a contract in which they were improperly self interested.

For purposes of the Official Misconduct Statute, (Illinois Revised Statutes, 1987, Chapter 38, Section 33-3), the court found that, although the settlement terms were not improper, the petitioners "direct involvement and control of the settlement negotiations and the eventual terms of the consent decree clearly went beyond the limits of defendants' lawful authority as defined in Section 33-3." *People v. Scharlau*, 152 Ill. Dec. at 409.[3]

And, by adopting the reasoning of the Seventh Circuit Court of Appeals in *Derrickson v. City of Danville*, 845 F.2d 715 (7th Cir. 1988), the court found:

> Because the acts for which defendants were convicted occurred before the Federal district court entered the consent decree, any reliance by defendants to statements made by the district judge was illusory. (App. 22).

Petitioners filed a Petition for Rehearing with the Supreme Court of Illinois which was denied on February 4, 1991. In that Petition, petitioners argued that the opinion of the court operated to deny petitioners the defense of reliance on the district court in violation of their rights to due process and equal protection of the law and deprived them of their First Amendment right to petition the courts of the United States.

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[3] In this context, the court stated:

"It would be improper, if not impossible, for us to define the guidelines to which defendants should have limited themselves in obtaining a settlement which would have afforded the kind of transition period that Danville's government required." (App. 17)

REASONS FOR GRANTING THE WRIT

I.

THE RESTRICTION BY A STATE OF IDEAS WHICH MAY BE PRESENTED BY THE PARTIES TO A FEDERAL COURT FOR SETTLEMENT OF A VOTING RIGHTS ACT LAWSUIT UNDERMINES THE PURPOSE OF THE ACT AND THIS COURT SHOULD ADDRESS WHAT CONSIDERATION A FEDERAL COURT NEED GIVE TO QUESTIONS OF STATE LAW VIOLATIONS ARISING FROM PRESENTATION OF SUCH A NEGOTIATED CONSENT DECREE.

To allow the result in this case is to permit a state to use its criminal prosecution powers to restrict the ideas which public officials might otherwise suggest to a federal court in the resolution of Voting Rights Act lawsuits, and thereby limit the fashioning of consent decrees which fairly represent the interests of all persons affected by such litigation.

If a state is permitted to prosecute and convict its local officials for agreeing to present a proposed consent decree to a federal court in a Voting Rights Act lawsuit, it creates a chilling effect on the presentation of ideas to the court. Absent as broad a panoply of suggestions from the parties as possible, the informed processes of the federal court are impeded. If those processes are impeded, then the effective and expeditious disposition of Voting Rights Act cases is hindered and delayed—contrary to the expressed will of Congress.

As this Court said in upholding over constitutional challenge the Voting Rights Act of 1965, the Act "reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) (footnote omitted).

Judge Cudahy, in his concurring opinion in *Derrickson v. City of Danville*, 845 F.2d 715, 724 (7th Cir. 1988) noted:

> The Voting Rights Act was originally enacted in 1965—as a sequel to the celebrated march across the bridge in Selma, Alabama—because it was generally believed that the states could not be relied upon to enforce the guarantees of the fourteenth and fifteenth amendments with respect to the right of minorities to vote. If anything was ever intended as an overpowering act of federal supremacy, it was the Voting Rights Act—and the Act was renewed in 1982 in the same spirit.

The class action lawsuit against the City of Danville was brought under this Act as amended, Title 42 U.S.C., Sec. 1973 *et seq.* (1982), on behalf of black minority voters who challenged Danville's commission form of government as diluting their voting rights. The city commissioners, who were the only people authorized to act on behalf of the city in response to this lawsuit, in light of all of the circumstances and legal advice then available to them, concluded that settlement rather than trial of the lawsuit was in the city's best interest.

They then engaged in discussions with the plaintiff's counsel through their own counsel to define the appropriate suggestions to be presented to the federal court for settlement with the view that that court would determine the lawfulness of the suggestions. Among those suggestions was one first made by plaintiffs involving the commissioners serving as salaried department heads in the transitional government—the provision whose negotiation is alleged to violate state conflict of interest laws.

On February 25, 1987, the federal court conducted a fairness hearing to consider the lawfulness, fairness and

adequacy of the settlement proposal submitted by the parties. At this hearing, the State's Attorney, objected to the proposal on the same conflict of interest grounds, with citation of the state law authority, on which he later prosecuted the petitioners.

Thus, regardless of the court's initial unwillingness to address the state law question and regardless of the procedural defect which the Seventh Circuit later found to exist in the form of hearing accorded to the State's Attorney, it is clear from the record that the District Court was aware of the potential state law violation and resolved the issue against the State's Attorney. A resolution of this issue was expected of him and this resolution was clearly within his discretion within the context of this case.[4]

The commissioner petitioners had no independent authority to enact any of the modifications to Danville's form of government which were proposed in the consent decree. See Illinois Revised Statutes, 1987 Chapter 24, Section 4-10-1. Once the District Court found a *prima facie* violation of the Voting Rights Act, it became the court's duty

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[4] The issue of whether petitioners' negotiation of the transition term violated Illinois law is not an easy one. Here the District Court in its findings expressed the view that the factual circumstances of this case distinguish petitioners' conduct from that addressed by Illinois conflict of interest law.

And the Appellate Court of Illinois unanimously held the state statutes inapplicable to the facts of this case and reversed petitioners' convictions. *People v. Scharlau*, 193 Ill.App.3d 280, 549 N.E.2d 911 (4th Dist. 1990).

The Supreme Court of Illinois in reversing the Appellate Court and reinstating the convictions totally disregarded the legal context in which petitioners' acts occurred and construed the consent decree under state law as a completed contract between the parties at the time of its submission to the federal court.

to consider the proposals submitted to it by the parties as a means of correcting the violation with the goal of determining the reasonableness and fairness of those proposals as a settlement of the lawsuit for plaintiffs, defendants and for third parties whose interests may not have been represented.

Given the nature of the litigation, the court had an obligation to minimize to the extent possible any conflicts between federal law and state policies and state laws which existed in the proposal. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976); *Connor v. Finch*, 431 U.S. 407 (1977).

As this Court noted in the context of enunciating principles governing reapportionment cases brought under the Act:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not preempt the legislative task [456 US 42] nor intrude upon state policy any more than necessary. *Upham v. Seamon*, 456 U.S. 37, 41-42 (1982), quoting from *White v. Weiser*, 412 U.S. 783, 794-95 (1973).

In Voting Rights Act cases then, a federal court must be concerned that in achieving the federally mandated result, the policies and laws of the state are considered and effectuated to the extent possible.

This concern for state law is especially important where the parties propose terms for settlement of Voting Rights Act litigation for approval by the District Court.

> Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. *Even when it affects only the parties, the court should,* therefore, examine it carefully to *ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence. This requires a determination* that the proposal *represents a reasonable factual and legal determination* based on the *facts* of record, whether established by evidence, affidavit, or stipulation. *If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.* (Emphasis added; footnote deleted.) *United States v. City of Miami,* 664 F.2d 435, 440-41 (5th Cir. 1981).

And see, *Overton v. City of Austin,* 748 F.2d 941, 956-7 (5th Cir. 1984).

The essential purpose of the Voting Rights Act is furthered by the cooperation of litigants in presenting any ideas to the federal court for its consideration in reaching an appropriate disposition of these cases with due regard for the rights of all parties—the minority plaintiffs, the (here) municipal defendants, unrepresented third parties, objecting intervenors—and with due regard for any competing state policy or law which threatens to hinder or delay the resolution of the Voting Rights Act violation.

Within this context, petitioners' acts—negotiating with plaintiffs and submitting the proposed consent decree containing the suggestions of the parties to the District Court—as a matter of federal policy, ought to be encouraged.

From the petitioners' perspective, these acts represented their best efforts on behalf of the City which they served. They were done after consultation with counsel and in reliance on legal advice that the federal court would consider and resolve any issues concerning state law violations. And they were acts premised upon the reasonable belief that a court would not accept a proposal which violated state law.

It is incumbent upon this Court to address the need for federal courts in Voting Rights Act cases to give appropriate consideration to state law issues which may be involved in the suggestions made by the parties to a federal court in the course of settlement. Absent full consideration of these issues by a federal court, collateral, punitive state measures pose a continuing, chilling effect on the ideas which public officials will be willing to present to a court, and will undermine the effective enforcement of the provisions of the Voting Rights Act.

II.

STATE PROSECUTION OF LOCAL OFFICIALS FOR THEIR AGREEMENT TO PRESENT A CONSENT DECREE IN A VOTING RIGHTS ACT CASE TO A UNITED STATES DISTRICT COURT FOR APPROVAL DEPRIVES THOSE OFFICIALS OF INDIVIDUAL RIGHTS AND PRIVILEGES THEY ENJOY AS CITIZENS OF THE UNITED STATES TO APPROACH THEIR GOVERNMENT, TO HAVE FREE ACCESS TO ITS COURTS, AND TO OPENLY EXPRESS THEIR IDEAS.

The Supreme Court of Illinois in this case did not enunciate any new standard in the area of state conflict of interest law. Its opinion is a reaffirmation of the traditional state policy of prohibiting public officers and officials from engaging in conduct which divides their loyalties between

their personal interests and their fiduciary duties. *People v. Scharlau*, 141 Ill.2d 180, 565 N.E.2d 1319, 152 Ill. Dec. 401, 407 (1990).

Under Illinois law, a conviction of official misconduct requires an act by a public officer or employee in his official capacity which exceeds his lawful authority, done with the intent to obtain a personal advantage for himself or another. *People v. Sims*, 108 Ill.App.3d 648, 64 Ill. Dec. 267, 439 N.E.2d 518 (1982). Knowledge that the officer is acting outside his official capacity is not an element of the crime. *People v. Kleffman*, 90 Ill.App.3d 1, 45 Ill. Dec. 475, 412 N.E.2d 1057 (1980).

All Illinois precedent, save the instant case, addresses situations in which the official's personal interest can be entirely severed from his official duties. *People v. Savaiano*, 66 Ill.2d 7, 3 Ill. Dec. 836, 359 N.E.2d 475 (1976); *People v. Scharlau*, 193 Ill.App.3d 280, 140 Ill. Dec. 260, 549 N.E.2d 911 (4th Dist. 1990). And, traditionally, the personal interest results from a factor wholly within the control of the official.

As the Appellate Court of Illinois noted, the situation presented by the facts of this case is quite different.

> Here, the defendants had a duty to resolve the Voting Rights Case in the best manner for the citizens of Danville. None of the parties question the advisability of a transitional period, which would bridge the uncertainty created by a total change in the form of government. The Voting Rights Case also presented a direct challenge to the Commissioners' continuation in office and thus directly impacted a personal interest in continued employment. The fiduciary duty of the defendants and any personal interest, thus, were inextricably linked together by the situation presented to them. We know of no fashion in which the defendants could have negotiated the best

> settlement for the City and have avoided any discussion of transitional governments where personal interests would be impacted. Therefore, in a mixed-interest situation such as that presented in the instant case, the conflict-of-interest statutes are not violated by negotiating a settlement which includes an incidental personal benefit. Settlement of the lawsuit was within the scope of the defendants' public duties, their actions were open to public scrutiny, and no practical manner existed for the defendants to remove themselves from the negotiation and settlement process . . . Here, all of the activities of defendant commissioners were within their official duties as members of a legislative body.
>
> Significant also is the fact that the settlement was tentative until its approval by the Federal court. Here, all parties recognize that the Federal court could have rejected the settlement with its transition period. Federal courts have been admonished to refuse approval when State laws are violated during the settlement process or by the settlement itself.

(140 Ill. Dec. at 268-69).

But, adopting certain reasoning of the Seventh Circuit Court of Appeals and construing the decree under Illinois law as a mere "recitation of the settlement agreement which the parties reached" which "do[es] not represent the judgment of a court", *People v. Scharlau*, 152 Ill. Dec. 401, 408 (1990), the state supreme court concluded that the proposal submitted to the district court was a completed contract which petitioners had negotiated in violation of state conflict of interest law.

> We also note that the crime of which defendants were eventually convicted occurred during the negotiation process, making irrelevant any after-the-fact statements by the district court judge. *People v. Scharlau*, (152 Ill. Dec. at 411, App. at 22) (Citations omitted.)

That court held:

> Because the acts for which defendants were convicted occurred before the Federal district court entered the consent decree, any reliance by defendants to statements made by the district judge was illusory. (152 Ill. Dec. at 411-12) (App. at 22).

By precluding petitioners in the state criminal proceeding from the defense of reliance (Illinois Revised Statutes, Chapter 38, Sections 4-8) on the findings of the federal court, the state has created an effective abridgement of petitioners' right of access to the courts guaranteed by the Petition Clause of the First Amendment.[5]

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[5] Until now petitioners have not expositively asserted an abridgement of their right to free access to the courts. Nonetheless, they have not waived it either.

From the earliest moments of controversy between the parties when the state's attorney first raised the specter of prosecution for violation of Illinois conflict of interest laws, before entry of the consent decree in the Voting Rights Act litigation, indeed from the moment the Voting Rights Act lawsuit was threatened, petitioners discussed among themselves and the attorneys their desire to seek review and approbation by the district court of any settlement proposals. It cannot be questioned that however reluctantly the District Court assumed responsibility for review of the terms and the negotiations of the settlement, as urged by petitioners, the District Judge did in fact find that the petitioners had violated no Illinois conflict of interest laws.

From the moment the consent decree was entered, petitioners have acted consistently with an assertion that they had a right to present their proposals to a court for review. They first sought to enjoin the prosecution on the basis that the issues had already been resolved in the federal district court, and then throughout trial and appeal they have urged reliance upon the district judge's determinations as a statutory defense to the prosecutions. It was not until the opinion of the Illinois Supreme Court that there was an adjudication that reliance was unavailable to petitioners as a defense because "the crime of which defendants were eventually convicted occurred during the negotiations process, making irrelevant any after-the-fact statements by the District Court Judge."

(Footnote continued on following page)

As this Court has recognized, it is not accidental that the rights of freedom of speech and of the press, and the rights to peaceably assemble and to petition for redress of grievances are joined together in the First Amendment. *Thomas v. Collins*, 323 U.S. 516 (1945); *DeJonge v. Oregon*, 299 U.S. 353 (1937). It is part of the American tradition to allow the widest room for discussion and the narrowest range for restriction of that discussion.[6]

The effect of the state court's ruling denying to petitioners the defense of reliance on the federal court in this case creates a severe restriction on their first amendment right of access to the courts protected by the Petition Clause.

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[5] *continued*

Under the circumstances of this case, failure of petitioners to explicitly invoke their constitutional defenses should not be deemed a waiver. The prosecution has not been prejudiced in any fashion by the timing of these claims because they have been aired in one sense or another throughout the litigation. Until now there was no clear abridgement requiring petitioners to raise or waive their constitutional claims. As this Court found in another situation where the constitutional protection urged to have been waived also safeguarded a freedom of citizenship at the "matrix" of nearly every other freedom, "(w)here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145, 18 L.Ed.2d 1094, 2005 (1967).

[6] Arguably, the individual rights being invoked here are so basic and fundamental to our democracy that they are held by virtue of the privileges and immunities clauses of Article IV and the Fourteenth Amendment of the Constitution of the United States. *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-552 (No. 3,230) (C.C.E.D. Pa., 1823); *Slaughter-House Cases*, 83 U.S. 36, 79 (1873) *citing Crandall v. Nevada*, 73 U.S. 35 (1868). It is ironic that persons have been prosecuted for attempting the exercise of a privilege of citizenship, the expression of ideas to their government, in a lawsuit brought to secure a closely related privilege of citizenship for others.

No litigant should be restricted in the ideas and suggestions which he may present to a court for its review by the threat of state prosecution even if the ideas or suggestions are misconstrued or wrong. Such a prior restraint on the expression of ideas in this context is abhorrent to First Amendment principles and the law as it has been enunciated by this Court in analogous situations.[7]

For example, in the cases of *Eastern R. R. Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1967), this Court held the Sherman Act inapplicable to concerted efforts by individuals to influence public officials even if their actions tended to destroy competition.

The *Noerr* decision rested on this reasoning:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of

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[7] See e.g. *Johnson v. Avery*, 393 U.S. 483 (1969) holding that a state may not enforce under the petition clause state prison regulations prohibiting inmates from assisting other inmates in preparing petitions for post conviction relief.

> Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. (365 U.S. at 137-138)

This two-pronged reasoning applies equally well here. By allowing the state to preclude petitioners from the defense of reliance on the federal court to charges of violating state conflict of interest laws, the Supreme Court of Illinois has erroneously subordinated petitioners' absolute rights of free expression and proposal of ideas to the rigid standards which in other circumstances bind public officials.

In the context of Voting Rights Act litigation challenging the very form of government in which the public officials are being called upon to function, there is a further concern also addressed elsewhere in this Petition. The uninhibited expression of thoughts and ideas to a United States District Court ought to be nourished and fostered in the setting of such litigation in order to preserve the informed operation of government processes, even if individual privileges and immunities of citizenship are not to be exalted.

The dissimilarity between petitioners' acts in presenting a proposed consent decree to a federal court for its review and approval or disapproval in a Voting Rights Act lawsuit and the traditional form of self dealing proscribed by Illinois conflict of interest law are apparent. When coupled with federal policy strongly favoring the broadest presentation of ideas to a court for a timely disposition of Voting Rights Act cases and petitioners' fundamental rights under the Petition Clause, it is clear that petitioners were entitled to rely on the federal court's findings as a defense to the criminal charges brought against them.

The Supreme Court of Illinois' decision to the contrary creates an unconstitutional restriction on public officials' rights to petition the courts of this country for guidance in resolving Voting Rights Act litigation and warrants review by this Court.

CONCLUSION

For the foregoing reasons, petitioners respectfully request this Court to grant certiorari to review the decision of the Supreme Court of Illinois in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

565 N.E.2d 1319 (1990)
141 Ill.2d 180

The PEOPLE of the State of Illinois, Appellee,

v.

Wilbur SCHARLAU et al., Appellants.

No. 69847.

Supreme Court of Illinois.

Nov. 30, 1990.

Rehearing Denied Feb. 4, 1991.

* * * * *

Justice STAMOS delivered the opinion of the court:

Defendants, Wilbur Scharlau, Ernie A. Cox, Jerome D. Brown, and Raymond T. Randall, were all serving as elected commissioners of Danville during the relevant times involved in this case. Defendant Scharlau, however, was acting mayor during these events because the elected mayor had resigned. Defendant Wendell Wright was corporation counsel of the City of Danville. All defendants were convicted of official misconduct (Ill.Rev.Stat.1989, ch. 38, par. 33-3(c)) and of violating the prohibition against municipal officials' having pecuniary interests in contracts involving the governmental unit they serve (Ill.Rev.Stat. 1989, ch. 24, par. 3-14-4(a); ch. 102, par. 3(a)) in the circuit court of Vermilion County. The appellate court reversed, holding that the statutes under which defendants were convicted did not apply in this case. (193 Ill.App.3d 280,

292-94, 140 Ill.Dec. 260, 549 N.E.2d 911.) We granted the State's petition for leave to appeal (107 Ill.2d R. 315), and we reverse.

Defendants had been prosecuted after they had settled a Federal class law suit brought pursuant to the Voting Rights Act of 1965 (42 U.S.C. § 1973b (1982 & Supp. V 1987)). This law suit involved allegations that the City of Danville's election practices diluted minority voting strength. The terms of the settlement changed Danville's municipal government from a mayor-commissioner system, where commissioners were elected city-wide, to a mayor-alderman system with the City divided into separate aldermanic districts. However, the settlement also guaranteed that defendants would be placed, by appointment, in newly created administrative positions, called "departmental heads," for three years at a fixed salary which defendants were given the power to determine.

BACKGROUND

Because the facts and procedural history of this case are explained in detail in the appellate court's opinion, we will only recite the facts necessary for the disposition of this appeal. In January 1987, defendants were nearing the end of their four-year terms as commissioners of the City of Danville and were anticipating running for reelection in February. At that time, a group of African American residents of Danville filed a Federal lawsuit against the city and its commissioners alleging that the nonpartisan, at-large, city-wide process for electing commission members excluded African American representation and diluted their voting strength.

One month later, the parties to this lawsuit filed a stipulation for a consent decree. This stipulation provided for

Danville's form of government to change from a mayor-commissioner system to a mayor-alderman system. For the defendants, the stipulation provided that: (1) for three years after the first general election under the new government, the commissioners would continue in office as the administrators of various departments which corresponded to their commission duties; (2) the occupants of these administrative, or "department head," positions would not be members of the city council and would have no legislative duties; (3) the administrators could be removed only by a majority vote of the city council for "misfeasance or malfeasance"; and (4) the current commissioners would determine the salaries for the new department heads, and these salaries could not change for four years.

The Federal district court originally entered a consent decree incorporating the stipulation's language. (193 Ill. App.3d at 284, 140 Ill.Dec. 260, 549 N.E.2d 911.) The Federal district judge later vacated this order and held hearings on the proposed settlement. At that time, several parties filed motions to intervene, arguing that the negotiation process used by defendants to reach the settlement violated State conflict-of-interest statutes and public policy. For this reason, the Vermilion County State's Attorney also was then made a party to the action.

These hearings revealed that defendant knew that they could not hope to prevail in the litigation. However, defendants had argued during negotiations that they needed to remain in office for a period of time after the new aldermen were elected in order to guarantee a smooth transition. Defendants indicated that the specific provisions regarding salary, length of term and removal were compromises upon which the voting rights plaintiffs agreed in the interest of protecting defendants from any reprisals

by the new aldermen. Both sides agreed that, even though defendants could not hope to prevail in the suit, the settlement was a reasonable means of avoiding prolonged and expensive litigation.

The State's Attorney argued throughout these proceedings that the settlement agreement violated State conflict-of-interest laws. The district judge repeatedly warned the State's Attorney that the court would not allow him to argue the merits of such claims, and indicated several times that the State's Attorney would have the opportunity to pursue the prosecution of defendants after a settlement were entered. At the conclusion of the hearings the district judge entered an order which found that the voting rights plaintiffs had a reasonable likelihood of success on the merits. He stated that, however, both parties to the suit had negotiated a reasonable settlement considering the potential length and cost of litigation and defendants' concern for an orderly transition. Particularly, he found that the provision for the three-year transition term provided stability and continuity of government. In an apparent contradiction of his earlier statements to the State's Attorney, the district judge found the settlement did not violate Illinois law and that the commissioners had not violated their fiduciary duty to the city. In reading his opinion into the record, the district judge stated:

> "[D]efendants, aside from avoiding years of turmoil, have saved the city the crippling expense of the litigation and diminished the cost of salaries for administrative officers. The city, had the litigation continued, would have paid commissioners' salaries for at least four and probably five more years. The defendants did not * * * secure a personal advantage in conflict with their duty to serve the city * * *. If the Illinois statutes are in conflict with the settlement, and

> I conclude they are not, then the state statutes should give way to the policy of the federal law. I conclude the proposed decree is fair, adequate, and reasonable and that it does not violate state or federal law."

Soon after the consent decree was entered, defendants stood trial in the circuit court of Vermilion County on charges of violating State conflict-of-interest statutes. During those proceedings, each defendant testified regarding the settlement process. Defendants admitted that they had no right to require that they retain their jobs as a condition of settling the voting rights lawsuit and that they were not legally entitled to retention. All defendants had testified at grand jury proceedings that they would receive personal benefits under the Federal consent decree and that they would never have considered agreeing to the settlement without the retention provisions.

Defendant Wright testified that defendants as a group felt that they were being asked to sacrifice their personal positions and that "if they were going to give up something, they were entitled to something in return." Although they did not use the issue in the negotiation process, Wright indicated that defendants had discussed among themselves which of their pensions would vest within the next three years. Defendants argued that their major concern was for an adequate transition, not for pension security. Wright also admitted that he had been aware that the Federal court had the ability to fashion the terms of settlement without the direct involvement of defendants in the negotiation process.

The State also introduced into evidence an indemnification ordinance which defendants enacted less than two weeks after the Federal court approved the consent decree. The ordinance, suggested by defendant Wright, pro-

vided indemnification by the city to its appointees (who included Wright along with the former commissioners) and further extended indemnification to include "any criminal action or proceeding if the indemnified person had no reasonable cause to believe his conduct was unlawful and any act or omission within the scope of the office or employment."

The circuit court found all defendants guilty. The former city commissioners were sentenced to two years' conditional discharge and fined $1,000 each. The court sentenced defendant Wright to two years' conditional discharge, 90 days in jail, and a fine of $5,000.

The appellate court reversed. Concentrating on the language of the Illinois Municipal Code (Ill.Rev.Stat.1989, ch. 24, par. 3-14-4(a)), the Corrupt Practices Act (Ill.Rev.Stat. 1989, ch. 102, par. 3(a)), and the Criminal Code of 1961 (Ill.Rev.Stat.1989, ch. 38, par. 33-3), the court determined that the conflict-of-interest provisions contained in each of these enactments were not applicable to defendants' case. The pertinent language of each statute follows.

Section 3-14-4(a) of the Illinois Municipal Code states:

> "No municipal officer shall be *interested*, directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any *contract*, work or business of the municipality, or in the sale of any article, whenever the expense, price or consideration of the *contract*, work, business or sale is paid either from the treasury or by any assessment levied by any statute or ordinance." (Emphasis added.) (Ill.Rev.Stat.1989, ch. 24, par. 3-14-4(a).)

Section 3(a) of the Corrupt Practices Act states:

> "No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner *interested*, either direct-

> ly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any *contract* or the performance of any work in the making or letting of which such officer may be called upon to act or vote." (Emphasis added.) (Ill. Rev.Stat.1989, ch. 102, par. 3(a).)

Section 33-3 of the Criminal Code of 1961 states:

> "A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:
>
> (a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or
>
> (b) Knowingly performs an act which he knows he is forbidden by law to perform; or
>
> (c) *With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority*; or
>
> (d) Solicits or knowingly accepts for the performance of an act a fee or reward which he knows is not authorized by law." (Emphasis added.) Ill.Rev. Stat.1989, ch. 38, par. 33-3.

The appellate court first cited to this court's traditional view of statutory interpretation. We have held that a court's interpretation and construction of statutes are governed by the principle that the legislature's intention is to be ascertained and given effect. (193 Ill.App.3d at 290, 140 Ill.Dec. 260, 549 N.E.2d 911, citing *Benjamin v. Cablevision Programming Investments* (1986), 114 Ill.2d 150, 102 Ill.Dec. 296, 499 N.E.2d 1309.) The appellate court also noted that when the terms of a statute are not defined, they are given their ordinary meaning, unless this would defeat legislative intent. (193 Ill.App.3d at 290, 140 Ill.Dec. 260, 549 N.E.2d 911, citing *People v. Hicks* (1984), 101 Ill.2d 366, 78 Ill.Dec. 354, 462 N.E.2d 473.) The court further noted that penal statutes are strictly construed,

and that any ambiguities in criminal statutes should be interpreted in favor of lenity. 193 Ill.App.3d at 290-91, 140 Ill.Dec. 260, 549 N.E.2d 911, citing *People v. Alejos* (1983), 97 Ill.2d 502, 74 Ill.Dec. 18, 455 N.E.2d 48.

The appellate court then examined the language of the statutes in question and considered the purposes for which they were enacted. The court concluded that the language and purpose of this legislation presented a "sweeping prohibition against public officials and officers engaging in conduct which divides their loyalty between their personal interests and their fiduciary duties." (193 Ill.App.3d at 292, 140 Ill.Dec. 260, 549 N.E.2d 911.) The court held that defendants' interest in continued employment did constitute a personal interest under this statutory scheme. The court also explained that bad faith or intentional wrongdoing is not necessary to support a conviction under the Illinois statutes which prohibit self-dealing. (193 Ill.App.3d at 292, 140 Ill.Dec. 260, 549 N.E.2d 911, citing *Miller v. County of Lake* (1980), 79 Ill.2d 481, 38 Ill.Dec. 798, 404 N.E.2d 222.) Therefore, the court held that defendants' arguments that they had acted with good intentions, and that the end result of defendants' actions benefited the city, did not preclude defendants' convictions. 193 Ill.App. 3d at 292, 140 Ill.Dec. 260, 549 N.E.2d 911.

The appellate court, however, found that, because the terms "contract" and "interest" are not defined in the express language of the statutes, there is an inherent ambiguity when the legislation is applied to defendants' case. The court stated that the Illinois cases addressing conflicts of interest in this area all deal with situations where an official's personal interest could be severed from official duties. (193 Ill.App.3d at 293, 140 Ill.Dec. 260, 549 N.E.2d 911, citing *People v. Savaiano* (1976), 66 Ill.2d 7, 3 Ill.Dec. 836, 359 N.E.2d 475.) The case at bar, however,

involved the "mixed-interests" of defendants. The court reasoned that the fiduciary duty which defendants owed the city and any personal interest in a potential settlement were "inextricably linked together by the situation presented to them." 193 Ill.App.3d at 293, 140 Ill.Dec. 260, 549 N.E.2d 911.

The appellate court explained that defendants were duty-bound to resolve the voting rights lawsuit in the best interests of the city. The litigation also presented defendants with the potential loss of their jobs. The court determined that defendants could not have negotiated the settlement without discussing a transitional government; this meant that, in the appellate court's eyes, the impact on defendants' personal interests was unavoidable. The court concluded that "in a mixed-interest situation * * * the conflict-of-interest statutes are not violated by negotiating a settlement which includes an *incidental personal benefit.* Settlement of the lawsuit was within the scope of the defendants' public duties, their actions were open to public scrutiny, and no practical manner existed for the defendants to remove themselves from the negotiation and settlement process." (Emphasis added.) 193 Ill.App.3d at 293, 140 Ill.Dec. 260, 549 N.E.2d 911.

ARGUMENT

The State contends that the appellate court relied on the proper rules of statutory construction in interpreting the conflict-of-interest statutes, but failed to apply them correctly. The State argues that there are no inherent ambiguities in any of these statutes. It contends that, given that these statutes are not ambiguous, there is no need to be lenient when interpreting these criminal statutes, because both the legislative intent and the evil that the General Assembly sought to address by enacting these

statutes is obvious. (See *Alejos*, 97 Ill.2d at 511-12, 74 Ill. Dec. 18, 455 N.E.2d 48.) They also disagree with the appellate court's articulation of an exception for "mixed-interest" cases, arguing that the statutory language clearly indicates that public officers may gain no personal interest in a municipal transaction and opining that, even if the legislature intended for public officials such as defendants to be able to receive some minute personal benefit if the product of the transaction or incident is totally beneficial to the city, there is nothing "incidental" about the benefits defendants gleaned from the settlement agreement. The State further argues that there are alternative methods of settlement negotiation which would have allowed defendants to reach an agreement without including themselves in the settlement process, and contends that the conflict of interest in the case at bar is entirely volitional.

Defendants respond by claiming that they had simply exercised their proper governmental authority in negotiating a settlement to the voting rights case that was in the best interests of the city. Defendants support this position by looking to the statements of the Federal district judge, who said that defendants had not violated their fiduciary duty, that the agreement was sensible and entered into in good faith, and that by settling the lawsuit defendants served the city well by saving Danville's taxpayers from the crushing burden of protracted and expensive litigation while providing the city with a smooth transition to the new government. They also claim that the State did not follow proper procedural channels and should have appealed the substance of the consent decree rather than prosecuting defendants; they suggest that the State is punishing them for doing their job. They also argue that they should have been allowed to rely on the

Federal district court's statement that the settlement did not violate State law as an affirmative defense in their subsequent prosecution, and that legislative immunity should have precluded their prosecution.

ANALYSIS

We agree with the State that defendants were properly convicted under the conflict-of-interest statutes and therefore reverse the judgment of the appellate court. We recognize that the dispositive issue in the case at bar is the proper construction of the statutes in question. We agree with the State that the appellate court recited the proper principles of statutory construction but then failed to cogently apply that law to the facts of this case.

As we have said, the judicial role in construing statutes is to ascertain legislative intent and give it effect. To aid in accomplishing this, a court will seek to determine the objective the legislature sought to accomplish and the evils it desired to remedy. (*City of Springfield v. Board of Election Commissioners* (1985), 105 Ill.2d 336, 340-41, 85 Ill. Dec. 508, 473 N.E.2d 1313.) We have no quarrel with the conclusion at which the appellate court arrived by using these principles of statutory construction; it found that the legislative intent in enacting these statutes was to codify "sweeping prohibition[s] against public officials and officers engaging in conduct which divides their loyalty between their personal interests and their fiduciary duties." (193 Ill.App.3d at 292, 140 Ill.Dec. 260, 549 N.E. 2d 911.) We find, however, that the appellate court erred in not applying these sweeping prohibitions to defendants' conduct.

Courts normally are required to interpret words in a statute according to their plain and ordinary meaning

(*People v. Moore* (1978), 69 Ill.2d 520, 523, 14 Ill.Dec. 470, 372 N.E.2d 666), unless this would defeat the legislative intent (*Hicks*, 101 Ill.2d at 371, 78 Ill.Dec. 354, 462 N.E. 2d 473). We find that the appellate court's construction and application of the terms "interest" and "contract" in these statutes violates this "plain-meaning" principle.

We cannot see how the words "interest" and "contract" as used in the statutes in question can be interpreted as ambiguous. If the legislature intends for general words to apply to a certain situation without restriction, it will generally use a single, compendious word in the statutory language. (*People v. Capuzi* (1960), 20 Ill.2d 486, 494, 170 N.E.2d 625.) "Interest" is just such a word. The term is general enough in scope to encompass the most basic right, claim, title, or legal share in something. (See Black's Law Dictionary 729 (5th ed. 1979).) We do not find that the sweeping scope of the word "interest" causes an ambiguity; rather, we find that the legislature's use of a compendious term with broad applications indicates a clear intent to broadly construe what constitutes an "interest" for the purpose of these statutes. Had the General Assembly intended otherwise, it either would have defined the parameters of the term, or would have modified it with more specific language. If the overall legislative intent behind these statutes is to enact "sweeping prohibition[s] against public officials and officers engaging in conduct which divides their loyalty between their personal interests and their fiduciary duties" (193 Ill.App.3d at 292, 140 Ill.Dec. 260, 549 N.E.2d 911), to consider the term "interest" as contained in the legislation to be ambiguous, apparently because it can be broadly applied, would tend to severely limit the "sweep" of any prohibitions the statutes were designed to provide. We note, however, that the appellate court interpreted defendants' "interests" in

this case as not to preclude conviction. 193 Ill.App.3d at 292, 140 Ill.Dec. 260, 549 N.E.2d 911.

We can apply the same analysis to the term "contract." We believe that we understand the apparent misgivings the appellate court had in applying section 3(a) of the Corrupt Practices Act and section 3-14-4(a) of the Illinois Municipal Code to the case at bar. The context in which the term "contract" is used appears to imply traditional business-type transactions. But the plain meaning of the term "contract" extends to a myriad of situations. The common law defines "contract" broadly, as "an agreement which creates an obligation." (17 C.J.S. *Contracts* § 1(a) (1963).) While defining this word differs from defining the term "interest" within these statutes, in that "contract" is modified by other terms such as "work" and "business," the difference is not great. These two latter terms are also compendious, and envision a broad range of behavior and relationships.

We think that the appellate court focused on too narrow a portion of these statutes when it attempted to define "contract." Section 3-14-4(a) of the Illinois Municipal Code states that "[n]o municipal officer shall be interested * * * in any contract, work or business *of the municipality* * * *." (Emphasis added.) (Ill.Rev.Stat.1989, ch. 24, par. 3-14-4(a).) Section 3(a) of the Corrupt Practices Act states that "[n]o person holding any office * * * may be in any manner interested * * * in any contract or the performance of any work *in the making or letting of which such officer may be called upon to act or vote.*" (Emphasis added.) (Ill.Rev.Stat.1989, ch. 102, par. 3(a).) Thus, the context in which the word "contract" appears in these statutes indicates that public officers are prohibited only from having interests in contracts which obligate the municipality, or from having interests in contracts which the offi-

cers have made or allowed and in which they will be called upon to approve of or perform while acting in their official capacity. Therefore, we conclude that the term "contract," as used in these statutes, will not be construed as broadly as the term "interest" as used in the same statutes.

This does not mean, however, that the consent decree is not a "contract" for purposes of these statutes. The consent decree is obviously an "agreement which creates an obligation." It also is an agreement which obligated the City of Danville and is an agreement which defendants had made and which they were called upon to approve of while acting in their official capacity. Further, Illinois law holds that consent decrees or judgments are merely recitations of the settlement agreement which the parties reached. (*Clark v. Standard Life & Accident Insurance Co.* (1979), 68 Ill.App.3d 977, 983, 25 Ill.Dec. 416, 386 N.E.2d 890.) Consent decrees entered by courts to effectuate settlement are therefore considered contracts between the parties to the litigation, and accordingly the law of contracts controls their interpretation. (*Kandalepas v. Economou* (1989), 191 Ill.App.3d 51, 54, 138 Ill.Dec. 329, 547 N.E.2d 496; *Citizens Utilities Co. v. Centex-Winston Corp.* (1989), 185 Ill.App.3d 610, 613, 133 Ill.Dec. 470, 541 N.E.2d 681; *Prairie Material Sales, Inc. v. White Diamond, Inc.* (1987), 157 Ill.App.3d 779, 784, 110 Ill.Dec. 205, 510 N.E.2d 1236.) The interpretation of any consent decree should be determined by the language of the parties (*Clark*, 68 Ill.App.3d at 983, 25 Ill.Dec. 416, 386 N.E.2d 890), and such decrees do not represent the judgment of a court (*Kandalepas*, 191 Ill.App.3d at 54, 138 Ill.Dec. 329, 547 N.E.2d 496.)

Thus, the consent decree cannot be characterized as a court order but must be interpreted as if it were an inde-

pendent contractual agreement, controlled by the law of contracts. In effect, the settlement agreement between the voting rights plaintiffs and defendants was a contract which consisted of a covenant not to sue exchanged for a promise of employment. Even though we recognize that the language of sections 3-14-4(a) and 3(a) both imply traditional business-type transactions, we find that a contract consisting of the terms found in the settlement agreement in the case at bar can be interpreted as just such a business transaction. We therefore find that because the common law defines a consent decree as a contract, the consent decree in the case at bar is a contract for purposes of sections 3-14-4(a) and 3(a).

We also find the appellate court's analysis of the relevant statutory language in this case to be insufficient because the court never specifically addressed the language of section 33-3 of the Criminal Code of 1961. Section 33-3 states that a public officer commits misconduct when the officer performs an act "in excess of his lawful authority" to "obtain a personal advantage for himself." (Ill.Rev. Stat.1989, ch. 38, par. 33-3(c).) The appellate court recognized that defendants had clearly obtained a personal advantage under the settlement agreement, but held that settling the lawsuit was "within the scope" of defendants' public duties. (193 Ill.App.3d 280, 140 Ill.Dec. 260, 549 N.E.2d 911.) The court apparently determined that, because it was a proper function of defendants' offices to settle the lawsuit, the prohibitions of section 33-3 were inapplicable to the case at bar.

We disagree. Defendants had a duty to act in the best interests of the city. They also had a duty to refrain from using their positions as city commissioners for personal benefit. We agree that defendants' settling the lawsuit was within their lawful authority. We find, however, that

defendants' arranging for their own employment for a fixed term and salary was outside that authority. Public officials are expected to adhere to the highest standards of ethical conduct. (See *Savaiano*, 66 Ill.2d at 15, 3 Ill. Dec. 836, 359 N.E.2d 475; Comment, *Illinois Conflict of Interest Law and Municipal Officers*, 12 S.Ill.U.L.J. 571, 571-72 (1988) (quoting President Kennedy, who said that "No responsibility for government is more fundamental than the responsibility of maintaining the highest standards of ethical behavior * * *. There can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality and complete devotion to the public interest," and citing O. Reynolds, Local Government Law § 84 (1982)).) The lawsuit in the case at bar could have been settled without defendants' receiving a three-year employment contract. It was obvious to defendants that there was no hope that they would prevail in the litigation. There was no guarantee that, absent the lawsuit, any defendant would have been reelected anyway. However, the voting rights suit guaranteed that defendants' positions would cease to exist. We can see no way to construe the lawful authority of the former Danville city commissioners to include the preservation of their jobs when the existing governmental structure violated the civil rights of the city's citizens and the citizenry could not have returned defendants to their offices in an election because the commission form of government would cease to exist. Of course, defendants instead could have run for mayor or alderman in the new city government.

This does not mean, however, that the terms of the settlement are improper. Defendants' concern for some sort of transitional government was legitimate. We only object to defendants' methods and the ultimate personal reward they gleaned from the establishment of that transi-

tion government. The appellate court stated that it could not conceive of any way that defendants could have removed themselves from the negotiation process. (193 Ill. App.3d at 293, 140 Ill.Dec. 260, 549 N.E.2d 911.) On the contrary, we determine that if the three statutes involved in this case are read in conjunction with each other, the prohibition against "making or letting" in section 3(a) and the "directly or indirectly" language of both sections 3(a) and 3-14-4(a) helps define the limits of defendants' "lawful authority" in negotiating this type of settlement. This language implies a "hands off" approach to the type of settlement negotiations that occurred here. To effectuate the statutory purpose of keeping the loyalties of public officials to their public trust undivided, the defendants should not have been involved in the negotiation process at all. It would be improper, if not impossible, for us to define the guidelines to which defendants should have limited themselves in obtaining a settlement which would have afforded the kind of transition period that Danville's government required. We note that Federal courts have entered consent decrees in settling these types of lawsuits while suggesting that the public officials who are parties need not be involved. (See *Derrickson v. City of Danville* (7th Cir.1988), 845 F.2d 715, 723 (defendants in case at bar could have "removed themselves from the process of negotiation [and] there would have been no serious question about either process or substance"); *Overton v. City of Austin* (5th Cir.1984), 748 F.2d 941, 945-47 (terms of interim order and consent decree in voting rights case called for court to enact its own plan should parties fail to agree).) We hold that defendants' direct involvement and control of the settlement negotiations and the eventual terms of the consent decree clearly went beyond the limits of defendants' lawful authority as defined in section 33-3.

We also disagree with the appellate court's determination that a "mixed-interest" situation will not trigger the prohibitions contained in these statutes. We find no indication in the language of the statutes that indicates that an "incidental personal benefit" is permissible, except in section 3-14-4. Sections 3-14-4(b), (c), and (d) narrowly define the specific types of personal interests a public official can have in a municipal contract, and the procedures the official must follow to avoid the criminal sanctions of the statute. (See Ill.Rev.Stat.1989, ch. 24, pars. 3-14-4(b), (c), (d).) These exceptions to section 3-14-4(a)'s prohibition against self-dealing allow public officials who are also business persons to transact business with the municipality they work for. This clearly is not the case for defendants.

We also find that the appellate court's use of a "mixed-interest" interpretation violates the legislative intent of these enactments. First, almost every example of official conduct could be classified as a "mixed-interest" case. The craftiest of corrupt politicians are experts at making their self-dealing appear to be in the best interests of their constituents. To allow instances of self-dealing to go unpunished merely because the benefit the public official receives is "incidental" or because the municipality receives the lion's share of the benefit would effectively prohibit the State from prosecuting all but the most egregious cases of official misconduct. These statutes are rarely or ineffectively used to battle official corruption now. (See generally Spak & Parenti, *Conflict of Interest: A Totally Ignored Illinois Criminal Sanction Against Corruption in Government*, 50 Chi-Kent L. Rev. 64 (1976); Comment, *Illinois Conflict of Interest Law and Municipal Officers*, 12 S.Ill.U.L.J. 571 (1988).) We will not embrace an interpretation which will further inhibit their use and frustrate the legislative intent to enact "sweeping prohibitions."

We also note that a conviction under section 33-3 of the Criminal Code of 1961 requires only that the accused have an intent to obtain a personal advantage for himself or another. (*People v. Sims* (1982), 108 Ill.App.3d 648, 651, 64 Ill.Dec. 267, 439 N.E.2d 518.) Knowledge that the action in question violates the statute by being outside the officer's lawful authority is not an element. (*People v. Kleffman* (1980), 90 Ill.App.3d 1, 3, 45 Ill.Dec. 475, 412 N.E.2d 1057.) The crime in these cases is not that a public official intends to exceed the official's authority, but that in seeking personal gain the official's public duty and personal interest are intertwined. Public officials in this situation cannot perform official duties without effecting their personal interests. There can be no "severing" of the two. (See 193 Ill.App.3d at 293, 140 Ill.Dec. 260, 549 N.E.2d 911.) This is the essence of what the appellate court defines as a mixed-interest case. We hold that the statutes under which defendants were convicted were enacted to discourage this type of ethical dilemma and the abuses that stem from it. See *Miller*, 79 Ill.2d at 490, 38 Ill.Dec. 798, 404 N.E.2d 222 (these provisions aimed at both bad-faith abuse of power and creation of relationships which carry potential abuse).

Parenthetically, we must disagree with the appellate court's characterization of the terms of the consent decree as affording defendants an "incidental" benefit. Defendants were faced with unemployment. An agreement which guaranteed them a three-year extension of their positions while giving them the power to set and fix their own salaries for four years is anything but "incidental" in light of this.

We also parenthetically note that the evidence of the municipal ordinance that defendants passed soon after the consent decree was entered only serves to support the

contention that defendants acted outside the limits of their authority. We find it odd that defendants found it necessary to enact an ordinance which indemnified Danville city officials for criminal acts performed while acting in the best interests of the city. This implies that, prior to this ordinance, Danville officials who violated a criminal statute while acting on the city's behalf in good faith would have been acting *outside* of their official capacity. While not dispositive, this evidence serves to further impugn defendants' actions in negotiating the terms of the consent decree.

We also cannot agree with defendants' contentions that the proper procedure the State should have followed was to file an appeal which objected to the terms of the settlement agreement. We find that the reasoning articulated by the Court of Appeals for the Seventh Circuit in its opinion dealing with this case is persuasive. When the Federal district court entered the consent decree, it entered a permanent injunction barring the State's Attorney from prosecuting defendants. The district judge reasoned that because the consent decree did not, in his opinion, violate State law, the State's Attorney could not relitigate these matters in the guise of a criminal proceeding. *Derrickson*, 845 F.2d at 716-17.

The Court of Appeals reversed. The court reasoned that the State, as represented by the State's Attorney, could be bound by the Federal district court's ruling only if the State's Attorney had to raise an issue before the district court but failed to do so (thus barring subsequent prosecution by claim preclusion or *res judicata*), or because the district court actually decided the central issue in the criminal prosecution (thus barring the criminal proceeding by issue preclusion or collateral estoppel). The court determined that *res judicata* did not apply, for several rea-

sons: the State's Attorney did not need to raise his claim under the Federal Rules of Civil Procedure; the Federal district court lacked jurisdiction to hear a State criminal case; the criminal prosecution did not grow out of the same transaction or occurrence as the civil claim before the district court; and a government employee's lack of authority to bind a municipality may be raised later if overlooked in negotiating a settlement. *Derrickson*, 845 F.2d at 721.

As for collateral estoppel, the court reasoned that the State would be bound by the Federal district court's ruling only to the extent questions of authority were litigated and decided. The court explained that issue preclusion applies only when a legal issue has been actually decided after a full and fair opportunity to litigate where the issue was necessary to the decision. (*Derrickson*, 845 F.2d at 721, citing *Parklane Hosiery Co. v. Shore* (1979), 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552.) The court determined that the district judge had severely limited the State's Attorney's participation in the case (*Derrickson*, 845 F.2d at 721-23) and had decided only whether defendants, as the government of the City of Danville, had the power to enter into the decree; he did not decide whether defendants were the proper parties to negotiate on behalf of the city while also acting as jobseekers (*Derrickson*, 845 F.2d at 721, 723). The Court of Appeals therefore found no basis for the injunction, and allowed the State's Attorney to prosecute defendants.

We agree with this reasoning. The Federal district court never adjudicated the conflict-of-interest issues on the merits. (*Derrickson*, 845 F.2d at 723.) Therefore, there was no decision from which to appeal regarding the issue of defendants' having committed a crime. Also, as we have said, a consent decree is, in effect, a contract, which can-

not be considered the judgment of the court. Absent fraud or some other defense to contractual formation, there is nothing the State's Attorney could have appealed from. (*Kandalepas*, 191 Ill.App.3d at 54, 138 Ill.Dec. 329, 547 N.E.2d 496.) We conclude that the only avenue the State's Attorney had by which to pursue vindication of the public policy of the State as embodied in the conflict-of-interest statutes at issue in the case at bar was to prosecute defendants.

This explanation of the Seventh Circuit decision also refutes defendants' argument that they should have been allowed to rely on the Federal district court's statement that the consent decree did not violate State law. The district court's entry of the consent decree never dealt with the substantive issues underlying defendants' eventual conviction. We also note that the crime of which defendants were eventually convicted occurred during the negotiation process, making irrelevant any after-the-fact statements by the district court judge. (See *Savaiano*, 66 Ill.2d at 15, 3 Ill.Dec. 836, 359 N.E.2d 475 ("[t]he evil exists because the official is *able to influence the process of forming a contract*" (emphasis added)).) We have already explained that all that was necessary for a conviction in this case was proof that defendants acted outside their lawful authority with intent to gain a personal advantage. Because the acts for which defendants were convicted occurred before the Federal district court entered the consent decree, any reliance by defendants to statements made by the district judge was illusory.

Finally, the defendants cannot rely on the doctrine of legislative immunity to protect them from prosecution. This issue was never raised by defendants prior to their appeal; therefore, the issue is waived. (*People v. Dale* (1986), 112 Ill.2d 460, 467, 98 Ill.Dec. 39, 493 N.E.2d 1060

(nonjurisdictional questions not properly presented to trial court are not considered on appeal).) Even if the issue had been preserved for review, however, defendants would not prevail. If courts are not allowed to inquire into the negotiation process of public officials engaged in their official legislative duties, the State could never prosecute public officials under the statutes which prohibit self-dealing. While defendants may have been immune from civil liability under the doctrine of legislative privilege, we cannot allow them to conceal their criminal violations and escape punishment merely because they committed their crimes while performing legislative duties. *United States v. Gillock* (1980), 445 U.S. 360, 372-73, 100 S.Ct. 1185, 1193-94, 63 L.Ed.2d 454, 646-65.

For the foregoing reasons, the judgment of the appellate court is reversed, and the judgment of the circuit court is affirmed.

Appellate court judgment reversed; circuit court judgment affirmed.

Justice MILLER took no part in the consideration or decision of this opinion.

APPENDIX B

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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February 4, 1991

Ms. Jayne Carr Thompson
Lydon & Griffin
100 West Monroe Street, 18th Flr.
Chicago, IL 60603

No. 69847—People State of Illinois, appellant, v. Wilbur Scharlau (Ernie A. Cox, et al., appellees). Appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Miller, C.J., and Bilandic, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 14, 1991.